

**OCT 02 2007**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

CARMEN JOHN PALMIERI,

Petitioner - Appellant,

v.

GEORGE GIURBINO,

Respondent - Appellee.

No. 06-56739

D.C. No. CV-06-01201-LSP

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Southern District of California  
Leo S. Papas, Magistrate Judge, Presiding

Submitted September 28, 2007<sup>\*\*</sup>  
Pasadena, California

Before: T.G. NELSON, IKUTA, and N.R. SMITH, Circuit Judges.

The district court erred by holding that the retroactivity doctrine barred Palmieri's claim under Blakely v. Washington, 542 U.S. 296 (2004), because Palmieri's conviction was not final when Blakely was announced—Palmieri had

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

not yet exhausted his state appeals. See Teague v. Lane, 489 U.S. 288, 295 (1989). The district court also erred by holding that Blakely was not violated because Palmieri admitted the facts necessary for an enhancement. Nothing in the record establishes that Palmieri admitted anything beyond the elements of the crime itself. Nor does anything in the record establish that he knowingly and voluntarily waived his right to have a jury find the aggravating facts.

Nonetheless, violations of Blakely are reviewed under a harmless error standard. See Washington v. Recuenco, 126 S. Ct. 2546, 2553 (2006). The California Court of Appeal determined that the Blakely error at Palmieri's sentencing was harmless beyond a reasonable doubt, applying Chapman v. California, 386 U.S. 18 (1967). This was not an unreasonable application of Supreme Court precedent. See 28 U.S.C. § 2254(d)(1).

It is clear that the state trial court intended to impose a thirty-year sentence, irrespective of the enhancements at issue in this appeal. It is also clear that the court could and would have imposed such a sentence on the basis of the entirety of the 144 counts, even without resort to the upper-term enhancements. Accordingly, the California Court of Appeal reasonably applied Supreme Court precedent when it concluded that any error by the state trial court was harmless. See also United States v. Zepeda-Martinez, 470 F.3d 909, 912–14 (9th Cir. 2006).

**AFFIRMED.**